United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

931

BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
For The District Of Columbia

No. 21,070

ROLLO MANOR,

Appellant,

v.

DISTRICT OF COLUMBIA,

Appellee.

Appeal From The United States District Court
For The District Of Columbia

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did not appellant's failure to prove that the District of Columbia had actual or constructive notice of a defective condition of the tree limb which fell and struck him compel a trial finding for appellee?

2. Did the trial court err in ruling on the admissibility of appellant's exhibits numbered 6 through 11?

3. Did appellant establish the requisite factual predicate for the application of the doctrine of res ipsa loquitur?

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant brought a negligence action against the District of Columbia for injuries received as a result of his being struck by a falling tree limb. Appellant waived trial by jury and the case was tried to the court.

Appellant introduced evidence that about 3:30 p.m. on July 31, 1960, he was walking north on the public sidewalk on the west side of the 1700 block of Eighteenth Street, Northwest. When in front of 1706

Eighteenth Street, he heard a cracking sound, turned, but was unable to avoid being struck by a tree limb which fell from a tree growing in the area between the curb and the sidewalk. The limb was approximately 4 1/2 inches in diameter and 13 feet long and was covered with green foliage (Findings of Fact 1 and 2; appellant's exhibit numbered 4). No other evidence respecting the condition of the limb or the tree from which it fell was presented.

Appellant called as a witness Mr. Jerome A. Lowe, Chief of the Tree and Landscaping Division of the District of Columbia Department of Highways and Traffic, who testified that he had in his custody certain records made in the usual course of the business of that division. Appellant sought to introduce into evidence several of these records (appellant's exhibits numbered 6 through 11). After careful examination of the proffered records, the court refused to admit them. Appellant, thereafter, rested his case, and appellee moved for a dismissal under Rule 41(b), Federal Rules of Civil Procedure, on the ground, inter alia, that appellant had failed to produce any evidence to show that the District of Columbia knew, or in the exercise of reasonable care should have known, that the limb which fell and injured appellant was in a defective and dangerous condition (Findings of Fact and Conclusions of Law). The court granted the motion and entered judgment for appellee.

SUMMARY OF ARGUMENT

I

In ruling on the motion, under Rule 41(b), Federal Rules of Civil Procedure, to dismiss at the end of the appellant's case, the court was permitted to decide the case on its merits and was not required to view appellant's evidence in a light most favorable to him. Rather, the court was required, as it did, to take an unbiased view of all the evidence and accord it such weight as it was entitled to receive.

II

Appellant, as a condition precedent to recovery in this action, was required to prove that the District of Columbia had actual or constructive notice of a defective condition of the limb. While the trial court properly excluded appellant's exhibits numbered 6 through 11, even if these exhibits had been admitted, they are without probative value in regard to the question of actual or constructive notice.

1. Exhibits numbered 6 and 11 concerned tree trimming accomplished after appellant's injury and are, therefore, not admissible for the purpose of showing a defective condition prior to the date of such trimming. Moreover, such exhibits contain no description of the nature or extent of any defect in the tree. They are, therefore, not probative on the issue of notice.

2. Exhibits numbered 7 and 8 were irrelevant because appellant established no connection between such exhibits and the particular tree from which the limb fell. Since exhibits numbered 7 and 8 referred to no particular tree, it is clear that they have no probative value for the purpose of showing that the District of Columbia had notice of a defect in the particular tree involved.

3. The notation on appellant's exhibit numbered 9, regarding the identity of the tree whose falling limb caused appellant's injury, was not a statement of fact, but an opinion. As such, it was inadmissible because there was no showing that either Mr. Lowe or the person making the notation was qualified to give an opinion as to which tree was the source of the falling limb. Even if admitted, this exhibit is not probative on the issue of notice because the exhibit is a series of responses to inquiries. These responses are unintelligible unless the exact questions are also known.

4. Exhibit numbered 10, a tree removal order dated October 10, 1958, was irrelevant because it failed to show that the tree ordered removed and the tree from which the limb fell were the same. Moreover, the removal order does not describe the condition of the tree or the reasons for its removal and is, accordingly, without probative value on the issue of actual or constructive notice.

III

The mere showing that the appellant was injured by a limb containing green foliage falling from a tree located on public space is an insufficient predicate for the application of the doctrine of res ipsa loquitur.

ARGUMENT

I

> In an action tried without a jury, the court may, at the close of the plaintiff's evidence, dismiss the action when, upon the law and the evidence, plaintiff has shown no right to relief.

Rule 41(b) of the Federal Rules of Civil Procedure provides in part:

> " * * * After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. * * * "

It is clear that the court's function when deciding a motion to dismiss under Rule 41(b) is different from that performed in deciding

a motion for a directed verdict under Rule 50(d). In the latter situation, the court must view the evidence in a light most favorable to the plaintiff. However, where, as here, the court also sits as the fact finder, Rule 41(b) permits the court to decide the case on its merits upon motion by the defendant after the plaintiff has presented his evidence. In deciding whether to grant the Rule 41(b) motion, the court is "not bound to view * * * [the evidence] in a light most favorable to the plaintiff, with all attendent favorable presumptions, but * * * [is] bound to take an unbiased view of all the evidence, direct and circumstantial, and accord it such weight as he believe[s] it entitled to receive." Allred v. Sasser, 170 F. 2d 233, 235 (7th Cir., 1948); Ellis v. Carter, 328 F. 2d 573 (9th Cir., 1964); Robinson v. Park Central Apartments, 248 F. Supp. 632 (D. C. D. C., 1965). And see Barron and Holtzoff, Federal Practice and Procedure (Wright ed., 1961), Vol. 2B, § 919 pp. 149-153.

II

The trial court properly refused to admit into evidence appellant's exhibits numbered 6, 7, 8, 9, 10, and 11.

As a condition precedent to any recovery against the District of Columbia, appellant was required to produce evidence to show that the

District had actual or constructive notice of a defective and dangerous condition of the limb which fell and struck him. District of Columbia v. Woodbury, 16 D. C. 127, affirmed, 136 U. S. 450 (1890); Campbell v. District of Columbia, 100 U. S. App. D. C. 120, 243 F. 2d 226 (1957); Annotation, 14 ALR 2d 197-203.

Appellant apparently concedes that he failed to prove actual or constructive notice. He complains, however, that he was precluded from doing so because the court refused to admit into evidence certain records identified as plaintiff's exhibits numbered 6 through 11. While it is appellee's position that these records were properly ruled inadmissible, it is submitted that, even if they had been admitted, they would have neither established nor tended to establish what appellant was required to prove, namely, that the District of Columbia had actual or constructive notice of a defect in the tree limb which caused the injury.

Exhibit numbered 6 is the Tree and Landscaping Division's daily work sheet for August 4, 1960. The pertinent entry reads: "Removed top of 25" linden curb tree down front of 1700-18th St. N. W." Exhibit numbered 11 recorded a complaint, dated August 3, 1960, concerning a "tree down across sidewalk 18th and R Sts, N. W." This record also contains under "Action taken" the entry: "Removed top of 25" linden curb tree front of 1700-18th St. N. W." These exhibits were

properly excluded because, although there is a split of authority (see Annotation, 170 ALR, pp. 53-59), the rule in the District of Coumbia is that " * * * subsequent repairs or alterations by a defendant of a place or instrumentality is not competent to show a former defective condition." Altemus et al. v. Talmadge, 61 App. D. C. 148, 152, 58 F. 2d 874, 878 (1932), cert. denied, 287 U. S. 614 (1932). Appellant asserts that the "evidence was admissible to prove the condition of the tree on the date of its removal" (appellant's brief, p. 4; emphasis added), but the record fails to reveal any such limited offer. On the contrary, it is clear that appellant's purpose was to use the records to show that a defective condition existed in the tree prior to the date of its removal. For such a purpose, the records were clearly inadmissible.

Further, these records contain no description of the extent or nature of the alleged defect in the tree. In the absence of any such description, the records, therefore, provided no probative evidentiary support on the issue of constructive notice.

Exhibits numbered 7 and 8 concern the District program for improving the maintenance of trees on public space. Both were rejected as not relevant (Tr. 7-8, 18). Appellant urges that, because exhibit numbered 8 contains a statement (at p. 2) that: "Recent survey of dead trees requiring removal indicates a total of 3,650 throughout the

District," it was admissible when considered in conjunction with exhibit numbered 10. Exhibit numbered 10 was, however, also inadmissible (see below). Exhibits numbered 7 and 8 were not relevant because appellant offered no proof that the tree from which the limb fell was one of the group of 3,650 dead trees noted by the survey. On the contrary, the only evidence available in this connection was that the tree, from which the limb fell, was alive on July 31, 1960, because the limb contained green foliage (appellant's exhibit numbered 4; Finding of Fact numbered 2).

Even if exhibits numbered 7, 8, and 10 had been admitted to show that the District of Columbia was not able to keep up with its tree removal schedule, they, again, provide no probative evidence that the District of Columbia had actual or constructive notice of a defect in the particular tree or limb in question.

Exhibit numbered 9 is a carbon copy of a memorandum, dated September 2, 1960, from Mr. Lowe to Mr. F. X. Litz, an Assistant Inspector of Claims for the District of Columbia. This exhibit contains ink notations indicating that the limb which fell and injured appellant came from a tree located in front of 1700 Eighteenth Street, Northwest. Mr. Lowe testified that these notations were made by one of his assistants (Tr. 29). In view of Mr. Lowe's testimony that his

records did not directly reflect which tree was the source of the falling limb (Tr. 39, 42), it becomes clear that the notation indicating the identity of the tree whose falling limb injured appellant represents only the opinion (or supposition) of Mr. Lowe's assistant. Neither Mr. Lowe nor his assistant (who did not appear at trial) was qualified to give such an opinion since there is nothing in the record to indicate that anyone from the Tree and Landscaping Division observed appellant's accident or investigated at the scene for the purpose of determining which tree was the source of the falling limb.

Moreover, exhibit numbered 9 does not provide probative evidence on the issue of constructive notice because, as it contains only answers to specific questions propounded by Mr. Litz, it is meaningless unless the exact questions are also known.

Exhibit numbered 10 is a work order dated October 16, 1958, ordering removal of a "20" Am. Linden tree standing at the curb, 3rd tree on west side of 18th St., N. W., bet. R & S Sts., front of 1700." This exhibit was properly ruled irrelevant (Tr. 37) because appellant failed to show that the tree ordered removed and the tree from which the limb fell were one and the same. On the contrary, Mr. Lowe's testimony was to the effect that they were not (Tr. 36-37). Even if exhibit numbered 10 had been admitted, it would not have

established constructive notice of a defective condition because the order itself did not describe the condition of the tree, but merely ordered it removed. The tree could obviously have been ordered removed for reasons other than a dead or dying condition.

III

The evidence fails to establish either a basis for recovery under the theory of nuisance or a predicate for the application of the doctrine of res ipsa loquitur.

Even assuming, arguendo, that the limb which fell and struck appellant may be regarded as a nuisance, this would not relieve him of the burden of showing that the District of Columbia had actual or constructive notice of a defective and dangerous condition of the limb. See, e.g., Jones v. Inhabitants of Town of Great Barrington, 273 Mass. 483, 174 N. E. 118 (1930). Reliance by appellant on the theory of nuisance is thus of no help to him.

In San Juan Light Co. v. Requena, 224 U. S. 89, 98 (1912), the Court said that the doctrine of res ipsa loquitur is:

> " * * * when a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as in the ordinary course of things does not occur if the

> one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care." [Citations omitted.]

In Ford v. District of Columbia, 190 A. 2d 905, 906-07 (1963), the District of Columbia Court of Appeals reiterated the established rules governing the application of the principle of res ipsa loquitur as follows:

> " * * * application of the principle requires that the instrumentality causing the accident be unlikely to do harm unless the person in control is negligent; or stated another way, if causes other than the defendant's negligence might have produced the accident, plaintiff must exclude those other causes by a preponderance of the evidence, for otherwise it would be sheer speculation to conclude that the cause of the accident was one within defendant's control; or put a third way, plaintiff's proof must at least show that it was more probable than not that the accident was the result of a defendant's negligence." [Footnotes omitted.]

In urging that the trial court erred in not applying the doctrine of res ipsa loquitur, appellant is, in effect, asserting that he presented sufficient evidence to permit a reasonable inference of negligence by the District of Columbia. Hohenthal v. District of Columbia, 72 App. D. C. 343, 114 F. 2d 494 (1940). But plainly he did not. Without

the requisite factual predicate, the doctrine of res ipsa loquitur was inapplicable.

The only evidence presented by appellant tending to show negligence was the fact that he was struck by a falling tree limb containing green foliage. This, without more, is clearly not sufficient to sustain the inference that an obvious, defective condition existed in such limb for a sufficient length of time prior to the accident to charge the District of Columbia with actual or constructive notice thereof. Compare Berkshire Mutual Fire Insurance Co. v. State, 9 App. Div. 2d 555, 189 N. Y. S. 2d 333 (1959). In a case almost factually identical, the Supreme Court of North Carolina said:

> " * * * Notice will be inferred from the notoriety of the defect, open to reasonable observation; but, if it be concealed or obscured in any way, so as to escape the attentive observation on the part of the defendant, notice will not be attributed to it. The burden of showing a defect and notice rests upon the plaintiff." Jones v. City of Greensboro, 124 N. C. 310, 32 S. E. 675 (1899).

Manifestly, appellant failed to bear his burden of showing that the District of Columbia knew or should have known that the limb which fell and injured him was defective and likely to be a danger to pedestrians walking beneath it.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the judgment appealed is in all respects correct and in accordance with law and should, therefore, be affirmed.

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